LOO HON KONG

v.

LOO KIM LIM

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ARIFFIN JAKA JCA
[CIVIL APPEAL NO: W-02-121-2001]
14 JUNE 2004

CIVIL PROCEDURE: *Appeal - Fact, findings of - Findings of fact by trial court unsupported by evidence - Whether appellate interference warranted*

CIVIL PROCEDURE: *Appeal - Evidence, evaluation of - Trial court failing to test defendant's evidence against the probabilities of the case - No assessment of defendant's evidence - Trial court failing to have regard to burden upon defendant - Whether trial court misdirected itself on the facts - Whether trial court failed to draw proper inferences - Whether appellate interference warranted*

LAND LAW: *Ownership - Beneficial ownership - Plaintiff and defendant brothers - Purchase price for land fully paid by plaintiff - Land registered in defendant's name - Whether beneficial ownership of land vested in the plaintiff - Whether resulting trust in favour of plaintiff created*

TRUSTS: *Resulting trust - Categories of - Whether closed - Whether new categories may be admitted - Plaintiff and defendant brothers - Purchase price for land fully paid by plaintiff - Land registered in defendant's name - No evidence of plaintiff intending to make gift of the land to defendant - Whether presumption of advancement in favour of defendant created*

TRUSTS: *Resulting trust - Presumption of advancement - Plaintiff and defendant brothers - Purchase price for land fully paid by plaintiff - Land registered in defendant's name - No evidence of plaintiff intending to make gift of the land to defendant - Whether presumption of advancement in favour of defendant created*

LAND LAW: *Ownership - Illegal transaction - Recoverability of property the subject matter of an illegal transaction - Whether owner may sue and recover property if he does not have to rely upon the illegality to support his claim*

The plaintiff and defendant were brothers. The plaintiff purchased a 1/2 undivided share in a piece of land under an agreement dated 25 February 1975. A year later, he purchased the remaining half but no written agreement was prepared for the second transaction. The land was then registered in the defendant's name. In or around October 1980, upon the plaintiff's request the defendant transferred the 1/2 share of the said land to the plaintiff while the other (1/2) undivided share remained in the defendant's name. The plaintiff later by a notice in writing demanded the retransfer of the remaining half (1/2) undivided share still in the defendant's name to the plaintiff's name, but the defendant refused. The defendant claimed that he paid the purchase price under the second transaction and was therefore both the legal and beneficial owner of the remaining (1/2) undivided share in the land. The plaintiff then commenced proceedings to recover the 1/2 undivided share of the land from the defendant. The plaintiff's case was that he provided the whole of the purchase price for the land. He registered the land in the defendant's name because he was unsure of the revenue/tax position. The defendant's pleaded case was that he provided part of the purchase price and that was the case he pursued throughout the trial. He did not at anytime amend his pleadings to raise an alternative case of illegality. The High Court however decided in the defendant's favour and the plaintiff appealed.

Held (allowing the appeal with costs)
Per Gopal Sri Ram JCA:

[1] The vendor's unshaken evidence under cross-examination was that he had dealt entirely with the plaintiff and that it was the plaintiff who had paid the price at each of the two stages. There was absolutely not a shred of documentary evidence put in by the defendant to show that he had paid any part of the purchase price. His answers given at the trial would not, when objectively viewed, inspire any confidence in his testimony in any reasonable tribunal of fact. Indeed, the evidence before the High Court was to the effect that the defendant was not in a financial position to have paid the purchase price of RM24,000 under the second transaction. It defied credibility and was highly improbable that the defendant who was impecunious had RM24,000 with which to pay the vendor. (pp 8 h & 9 a)

[2] On the facts, the trial court failed to test the evidence of the defendant against the probabilities of the case. There was simply no assessment of the defendant's evidence, particularly against the probabilities of the case and with the defendant's own documents. The trial court also failed to sufficiently bear in mind that the burden of proving that he paid the

purchase price under the second transaction laid on the defendant which he had to discharge by adducing cogent evidence, which evidence was wanting and in fact went the other way. The trial court therefore misdirected itself on the facts and failed to draw proper inferences. Having carefully scrutinised the whole of the oral and documentary evidence the Court of Appeal was satisfied that the finding that the defendant had contributed to the purchase price under the second transaction could not stand. (p 9 b-f)

[3] The plaintiff having paid the entire purchase price for the land, the act of registering the land in the defendant's name merely vested the nominal legal ownership in the latter. The beneficial ownership resulted to the plaintiff. This was because the relationship between the parties did not come within one of the special categories recognised by equity as creating a presumption of advancement in favour of the holder of the legal title. (p 10 a)

[4] The categories of cases in which a resulting trust may arise are closed and no new category may now be admitted. This was a case of a purchase in the name of another with no intention of making a gift of the property. It was not the defendant's pleaded case that although the property was paid for by the plaintiff, he intended to make a gift of it to the defendant. The defendant put forward only one ground, namely, that he had paid part of the purchase price, an assertion which did not stand up to close scrutiny. *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 (foll). (pp 10 b-h & 11 a)

[5] The Court of Appeal was unable to agree with the High Court's finding that the plaintiff's claim was tainted with illegality as the evidence did not support it. The plaintiff purchased the land in the defendant's name because he was not sure of the tax position in this country and was worried about losing the land. No question of defrauding the revenue arose. This was an ordinary case of a resulting trust in the plaintiff's favour. The plaintiff was therefore entitled to call for a transfer of the remaining 1/2 undivided share in the land to him and to compel a transfer upon the defendant's refusal to comply. (p 11 d-e)

[6] Even assuming that the plaintiff's purpose was to evade the payment of revenue, he was nevertheless entitled to enforce the resulting trust operating in his favour by compelling the defendant to transfer the land to him. It is a settled principle of law that the owner of property, whether legal or equitable, which is the subject matter of an illegal transaction may sue and recover it if he does not have to rely upon the illegality to support

his claim. *PP v. Intra Group (Holdings) Co Inc* [1999] 1 SLR 803 (refd); *Amar Singh v. Kulubya* [1964] AC 142 (refd); *Tinsley v. Milligan* [1994] 1 AC 340 (refd). (p 11 f-h)

Obiter:

[1] Under the common law of Singapore, a resulting trust created by an act of parties will not be enforced where to do so will be contrary to public policy. (See, *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170; *Cheong Yoke Kuen v. Cheong Kok Keong* [1999] 2 SLR 476. However, Malaysian jurisprudence, anchored on the foundation of binding precedent, does not admit of such a principle. (see *Chettiar v. Chettiar* [1962] MLJ 143 and *Singh v. Ali* [1960] MLJ 52). (p 17 a)

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif dan defendan adalah dua orang adik beradik. Plaintif membeli 1/2 bahagian sebidang tanah di bawah satu perjanjian bertarikh 25 Februari 1975. Setahun kemudian, beliau membeli baki 1/2 bahagian tanah tersebut tetapi tidak membuat sebarang perjanjian mengenainya. Tanah tersebut kemudian didaftar di atas nama defendan. Pada atau sekitar Oktober 1980, atas permintaan plaintif, defendan memindah milik 1/2 bahagian tanah tersebut kepada plaintif, sementara 1/2 bahagian pegangan tak berbelah baginya masih terdaftar atas nama defendan. Berikutnya, melalui satu notis bertulis, plaintif menuntut defendan memindah milik 1/2 bahagian pegangan tak berbelah yang masih terdaftar atas nama defendan tersebut, tetapi defendan enggan berbuat demikian. Menurut defendan beliau telah membayar harga bagi pembelian yang kedua itu, dan dengan itu telah menjadi pemilik sah untuk 1/2 bahagian tak berbelah bagi tanah tersebut. Plaintif kemudian memfailkan prosiding menuntut penyerahan 1/2 bahagian tak berbelah bagi tanah berkenaan. Adalah menjadi kes plaintif bahawa beliau telah membayar sepenuhnya harga belian bagi keseluruhan tanah tersebut. Menurut plaintif, beliau telah mendaftarkan nama defendan semata-mata kerana beliau kurang pasti tentang kedudukan cukai bagi pembelian tersebut. Defendan mengatakan bahawa beliau telah menyumbang kepada sebahagian harga belian dan disepanjang perbicaraan tidak berganjak dengan pendiriannya. Defendan juga tidak pernah meminda plidingnya untuk membangkitkan isu ketidaksahan. Walaupun begitu Mahkamah Tinggi membuat keputusan untuk defendan dan plaintif merayu.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Gopal Sri Ram HMR:

[1] Keterangan kukuh penjual pada pemerikasaan balas adalah bahawa beliau berurusan sepenuhnya dengan plaintif dan bahawa plaintiflah yang membayar harga belian di kedua-dua peringkat pembelian. Tiada sedikit pun keterangan dikemukakan oleh defendan yang menunjukkan bahawa beliau telah membayar sebahagian dari harga belian. Jawapan-jawapan yang diberi oleh defendan di perbicaraan, dilihat secara objektif, tidak dapat meyakinkan tribunal fakta. Malah, keterangan di Mahkamah Tinggi adalah bahawa defendan tidak mampu membayar harga belian berjumlah RM24,000 bagi pembelian kedua. Adalah tidak mungkin dan sukar dipercayai bahawa defendan yang begitu miskin mempunyai RM24,000 untuk membayar penjual.

[2] Di atas fakta, yang arif hakim gagal menguji keterangan defendan dengan berdasarkan kemungkinan-kemungkinan kes. Penilaian terhadap keterangan defendan langsung tidak dibuat, terutama dengan cara menimbang kemungkinan-kemungkinan kes dan dokumen-dokumen defendan sendiri. Mahkamah bicara juga gagal mengambil kira secukupnya bahawa beban adalah atas defendan untuk membuktikan bahawa harga belian di transaksi kedua telah dibayar, di mana beliau perlu membuktikannya dengan keterangan yang boleh dipercayai, sedangkan keterangan sedemikian bukan sahaja tidak ada malah menuding ke arah sebaliknya. Oleh itu mahkamah bicara telah melakukan salah arahan di atas fakta dan gagal membuat andaian-andaian wajar. Meneliti dengan halus keterangan-keterangan lisan dan dokumentar, Mahkamah Rayuan berpuas hati bahawa keputusan yang mengatakan defendan telah menyumbang kepada harga belian di bawah transaksi kedua adalah tidak boleh disokong.

[3] Oleh kerana plaintif telah membayar harga belian tanah sepenuhnya, maka tindakan plaintif mendaftarkan tanah atas nama defendan hanya memberikan hak milik nominal kepada defendan. Hak milik benefisial masih terletak pada plaintif. Ini kerana hubungan antara mereka tidak termasuk dalam mana-mana kategori khas yang dilihat oleh ekuiti sebagai membentuk anggapan pembayaran yang berpihak kepada pemegang hak milik undang-undang.

[4] Kategori kes-kes di mana suatu amanah berbangkit boleh muncul sudah tertutup dan tiada lagi kategori baru boleh diterima kini. Ini adalah suatu kes pembelian atas nama seorang lain tanpa adanya niat untuk menghadiah harta tersebut. Kes yang diplid defendan bukanlah bahawa, walaupun

hartanah telah dibayar oleh plaintif, plaintif sebenarnya ingin menghadiahkan hartanah itu kepada beliau. Defendan hanya mengemukakan satu alasan, iaitu, bahawa beliau telah membayar sebahagian dari harga belian, satu kenyataan yang apabila diteliti tidak dapat dibenarkan (*Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1966] AC 669 (diikuti)).

[5] Mahkamah Rayuan tidak dapat menyetujui pendapat Mahkamah Tinggi bahawa tuntutan plaintif telah terjejas oleh ketidaksahan, kerana keterangan tidak menyokong pendapat itu. Plaintif membeli tanah atas nama defendan kerana beliau tidak pasti akan kedudukan cukai di negara ini dan bimbang akan kehilangan tanah tersebut. Tidak timbul persoalan untuk menipu pihak berkuasa cukai. Ini adalah satu kes biasa amanah berbangkit yang berpihak kepada plaintif. Plaintif dengan itu berhak untuk menuntut pindah milik 1/2 bahagian lagi tanah tersebut dan untuk memaksa defendan jika ia enggan berbuat demikian.

[6] Jikapun diandaikan tujuan plaintif adalah untuk mengelak cukai, beliau masih berhak menyempurnakan amanah berbangkit yang berpihak kepadanya itu dengan cara memaksa defendan untuk melakukan pindah milik kepadanya. Adalah menjadi prinsip yang biasa dipakai bahawa pemilik sesuatu harta yang menjadi subjek transaksi yang tidak sah, sama ada ia pemilik pada sisi undang-undang atau ekuiti, boleh menuntut untuk mendapat kembali harta tersebut jika ia tidak bergantung kepada ketidaksahan untuk menyokong tuntutannya itu (*PP v. Intra Group (Holdings) Co Inc* [1999] 1 SLR 803 (dirujuk); *Amar Singh v. Kulubya* [1964] AC 142 (dirujuk); *Tinsley v. Milligan* [1994] 1 AC 340 (dirujuk)).

Obiter:

[1] Di bawah common law Singapura, sesuatu amanah berbangkit yang tercipta akibat suatu tindakan oleh pihak-pihak tidak akan dikuatkuasakan jika berbuat demikian bertentangan dengan polisi awam (lihat *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170; *Cheong Yoke Kuen v. Cheong Kok Keong* [1999] 2 SLR 476). Walaupun begitu, jurisprudens Malaysia, yang berasaskan kepada undang-undang duluan mengikat, tidak menerima prinsip sedemikian (lihat *Chettiar v. Chettiar* [1962] MLJ 143 dan *Singh v. Ali* [1960] MLJ 52)

Case(s) referred to:
Amar Singh v. Kulubya [1964] AC 142 ***(refd)***
BOI Finance Ltd v. The Custodian AIR [1997] SC 1952 ***(refd)***
Cheong Yoke Kuen v. Cheong Kok Keong [1999] 2 SLR 476 ***(refd)***
Chettiar v. Chettiar [1962] MLJ 143 ***(refd)***
Gorog v. Kiss [1977] 16 OR (2d) 569 ***(refd)***
PP v. Intra Group (Holdings) Co Inc [1999] 1 SLR 803 ***(refd)***
Singh v. Ali [1960] MLJ 52 ***(refd)***
Suntoso Jacob v. Kong Miao Ming [1986] 2 MLJ 170 ***(refd)***
Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***
Tinsley v. Miligan [1994] 1 AC 340 ***(refd)***
Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669 ***(foll)***

Other source(s) referred to:
Prof Peter Birks, *Restitution and Resulting Trusts in Equity and Contemporary Legal Developments*, pp 335 & 360

For the appellant - PS Gill; M/s Gill & Tang
For the respondent - N Sivagurunathan (KE Ng); M/s Shamiah KE Ng & Siva

[Appeal from High Court, Kuala Lumpur; Suit No: S3-22-543-05]

Reported by Andrew Christopher Simon

JUDGMENT

Gopal Sri Ram JCA:
This is the judgment of the court.

Two questions arise in this appeal. One is a question of fact and the other a question of law. The factual matrix from which these questions arise fall within a small compass. For convenience, we will refer to the parties in accordance with the title assigned to them in the court below. This is the plaintiff's appeal.

The Facts And Issues
The plaintiff and the defendant are brothers. The defendant is the registered proprietor of a piece of land which was acquired by way of two separate transactions. In the first transaction the plaintiff purchased a 1/2 undivided share in the land under an agreement dated 25 February 1975. The price was RM21,654. About a year later, the remaining half was purchased for RM24,000. No written agreement was prepared for this second transaction. The land was then registered in the defendant's name. However, in or around October 1980, upon the plaintiff's request the defendant transferred the 1/2 share of the said land to the plaintiff while the other (1/2) undivided share remained in the defendant's name. Later the plaintiff has by a notice in writing dated 17 October 1995 to the defendant's solicitors demanded the retransfer of the

remaining half (1/2) undivided share still in the defendant's name to the plaintiff's name, but the defendant refused. He claimed that he paid RM24,000 under the second transaction and was therefore both legal and beneficial owner of the remaining (1/2) undivided share in the land. The plaintiff then commenced proceedings to recover the 1/2 undivided share of the land from the defendant.

The plaintiff's case is that he provided the whole of the purchase price for the land. His reason for having the land registered in his brother's name appeared for the first time during his evidence in chief. This is what he said:

> I wanted my brother's name because I had some money in Singapore and brought it back to Malaysia and I was not sure of the tax position in Malaysia. So I wanted to use his name.
>
> I was worried about being taxed – about losing the property. I told the lawyer Lek Yan to put the Defendant's name on the property.
>
> I told the lawyer that I want my brother's name to be in the title and to hold it for me first – later I will take it from him.
>
> I told the Defendant about putting the property in his name. I told Lek Yan I was not sure about the tax position in Malaysia – that's why I want the Defendant's name to be in the title first.

The defendant did not pursue this point with any vigour in the cross-examination of the plaintiff. His pleaded case is that he provided part of the purchase price and that is the case he pursued throughout the trial. He did not at anytime amend his pleadings to raise an alternative case of illegality.

The Factual Question

So, the first question – the question of fact – is whether it was the plaintiff who had paid the entire price or whether the defendant had contributed an equal share. It is a straightforward question. The High Court resolved it in the defendant's favour. Was it right in doing this? Learned counsel for the plaintiff submitted that it was not. Learned counsel for the defendant submitted that it was. With respect, we agree with plaintiff's counsel.

The best evidence to prove who had paid the whole of the purchase price was that of the vendor. And his evidence, unshaken under cross-examination is that he had dealt entirely with the plaintiff and that it was the plaintiff who had paid the price at each of the two stages. There was absolutely not a shred of documentary evidence put in by the defendant to show that he had paid any part of the purchase price. His answers given at the trial would not, when objectively viewed, inspire any confidence in his testimony in any reasonable tribunal of fact. Indeed, the evidence before the High Court was to the effect that the defendant was not in a financial position to have paid the purchase

price of RM24,000 under the second transaction. It defies credibility and is highly improbable that the defendant who was impecunious had RM24,000 with which to pay the vendor.

In a case as the present the proper approach for the trial court is to test the evidence of the defendant against the probabilities of the case. This is the approach that commended itself to the Federal Court in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229 where Chang Min Tat FJ said:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

Unfortunately, the trial court did not adopt this approach. There was simply no assessment of the defendant's evidence, particularly against the probabilities of the case and with the defendant's own documents. We refer in particular to the defendant's own letter dated 1 February 1981 in which he frankly acknowledged that the plaintiff had paid the full purchase price for the land.

Further, the court below failed to sufficiently bear in mind that the burden of proving that he paid the purchase price under the second transaction lay on the defendant which he had to discharge by adducing cogent evidence. Needless to say cogent evidence from the defendant was wanting. The relevant evidence in fact went the other way. The trial court therefore misdirected itself on the facts and failed to draw proper inferences. Having carefully scrutinised the whole of the oral and documentary evidence we are satisfied that the finding that the defendant had contributed to the purchase price under the second transaction cannot stand. He should have held that it was the plaintiff who had provided the entire purchase price.

The Question Of Law

(i) Resulting Trust

The question of law that arises on the facts is whether the plaintiff can compel the defendant to transfer the legal title to the land to him. This is an equally straightforward issue. The law on the point is not in doubt. Neither is there any difficulty in applying it to the facts here.

The plaintiff having paid the entire purchase price for the land, the act of registering the land in the defendant's name merely vested the nominal legal ownership in the latter. The beneficial ownership results to the plaintiff. This is because the relationship between the parties here does not come within one of the special categories recognised by equity as creating a presumption of advancement in favour of the holder of the legal title.

The very limited and well-established circumstances in which a resulting trust may arise were dealt with by Lord Browne-Wilkinson in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669, 708. He said:

> Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see *Underhill and Hayton* pp. 317ff, *Vandervell v. IRC* [1967] 1 All ER 1 at 8, [1967] 2 AC 291 at 312ff and *Re Vandervell's Trusts (No 2), White v. Vandervell Trustees Ltd* [1974] 1 All ER 47 at 63ff, [1974] Ch 269 at 288ff. (B) Where A transfers property to B on express trusts, but the trusts declared do not exhaust the whole beneficial interest: *ibid* and *Barclays Bank Ltd v. Quistclose Investments Ltd* [1968] 3 All ER 651, [1970] AC 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention. Megarry J in *Re Vandervell's Trusts (No 2)* suggests that a resulting trust of type (B) does not depend on intention but operates automatically. I am not convinced that this is right. If the settlor has expressly, or by necessary implication, abandoned any beneficial interest in the trust property, there is in my view no resulting trust: the undisposed-of equitable interest vests in the Crown as *bona vacantia*: see *Re West Sussex Constabulary's Widows, Children and Benevolent* (1930) Fund Trusts [1970] 1 All ER 544, [1971] Ch 1.

We pause to emphasise – if emphasis is required – that the categories of cases in which a resulting trust may arise are closed and no new category may now be admitted. In particular we would reject – as did the House of Lords in Westdeutsche Landesbank – the suggestion by Professor Peter Birks (*"Restitution and Resulting Trusts" in Equity and Contemporary Legal Developments* p. 335 at 360) that a resulting trust should arise wherever money is paid under a mistake or when money is paid on a condition which subsequently fails.

The facts of the present instance clearly fall within the second limb of category (A) of the Browne-Wilkinson formula. For, this is a case of a purchase in the name of another with no intention of making a gift of the property. We would for good measure add that it is not the instant defendant's pleaded case that although the property was paid for by the plaintiff, he intended to make a gift of it to the defendant. The defendant, both in the court below and before us, put forward only one ground, namely, that he had paid part of the purchase price, an assertion which, as we have already said, does not stand up to close scrutiny.

(ii) Bar To Recovery

Is there anything to bar the plaintiff from enforcing his equitable title against the defendant? The High Court thought there was. With respect, we do not agree.

The High Court denied recovery on the ground that the plaintiff's claim was tainted with illegality. In the words, of the learned trial judge the plaintiff "was trying to evade payment of revenue to the Government" by having the land registered in the defendant's name. We are respectfully unable to agree with this finding. The evidence does not support it. What the plaintiff said was that he purchased the land in the defendant's name because he was not sure of the tax position in this country and was worried about losing the land. No question of defrauding the revenue arose. We are therefore of the view that this is an ordinary case of a resulting trust in the plaintiff's favour. The plaintiff was therefore entitled to call for a transfer of the remaining 1/2 undivided share in the land to him and to compel a transfer upon the defendant's refusal to comply.

Even assuming that the plaintiff's purpose was to evade the payment of revenue, he is nevertheless entitled to enforce the resulting trust operating in his favour by compelling the defendant to transfer the land to him. For, it is a settled principle of law that the owner of property, whether legal or equitable, which is the subject matter of an illegal transaction may sue and recover it if he does not have to rely upon the illegality to support his claim. Or, as Yong Pung How CJ (Singapore) said in *Public Prosecutor v. Intra Group (Holdings) Co Inc* [1999] 1 SLR 803, employing language unrivalled for its trenchant lucidity:

> The courts will, however, render assistance to recover property transferred for an illegal purpose provided that the underlying illegal purpose does not have to be relied upon: *Bowmaker's Ltd v. Barnet Instruments Ltd* [1945] KB 65.

There are many authorities that support the proposition. It is unnecessary to go through them all here. Suffice that we cite two of the leading cases on the point. *Amar Singh v. Kulubya* [1964] AC 142 is the first. Kulubya, the respondent, was an African. He owned some Mailo land. He agreed to lease

three plots in it to the appellant, Amar Singh, an Indian, without obtaining the consents that were necessary by the relevant East African legislation. Kulubya allowed Amar Singh to remain in possession of the land. Later, he brought an action to recover possession, as well as rent, mesne profits and damages. The appellant pleaded illegality. Thereupon, the respondent abandoned his claims for rent, mesne profits and damages and confined his claim to vacant possession. The trial judge dismissed the action. On appeal, the East African Court of Appeal reversed the judge and granted the respondent vacant possession. On further appeal, the judicial committee affirmed the Court of Appeal.

Lord Morris of Borth-y-Gest, delivered the advice of the Board. He said (at p. 503):

> Their Lordships consider therefore that the plaintiff's right to possession was in no way based on the purported agreements. It was the defendant who might have needed to rely on them, because, had they been valid and permissible agreements, the defendant would have contended that the tenancies would have needed for their termination longer periods of notice than those contained in the notices to quit that were given. As it was, the contention of the defendant (based on para 3 of the defence) was that the plaintiff was disabled from suing because he had been a party to illegal agreements. *It was quite correct, as set out in that paragraph of the defence, that the plaintiff had been a party to illegal agreements. At the time of the trial, however, he was not basing his claim 'on the said agreements'. Indeed he could have presented his claim (if it were limited to a claim for possession) without being under any necessity of setting out the unlawful agreements in his plaint. He required no aid from the illegal transactions in order to establish his case.* (*Compare Simpson v. Bloss* [1816] 7 Taunt 246). It was sufficient for him to show that he was the registered proprietor of the plots of land and that the defendant who was a non-African was in occupation without possessing the consent in writing of the Governor for such occupation and accordingly had no right to occupy. It is true that the plaintiff referred to the purported agreements to which he had been a party and that he repudiated them and acknowledged that they were illegal. It was, however, in spite of and not because of those illegal agreements that he was entitled to possession. Though the plaintiff had offended by being a party to the illegal and ineffective agreements their Lordships do not consider that considerations of public policy demanded the failure of his claim for possession: on the contrary such considerations pointed to the necessity of upholding it in order to eject a non-African who was in unlawful occupation. (emphasis added.)

Amar Singh v. Kulubya concerned the enforcement of a legal title to property. But the position is no different where what is sought to be enforced is an equitable title. The point has been established by *Tinsley v. Milligan* [1994] 1 AC 340, which is the second authority we cite. Two single women who were living together purchased a house. It was registered in the sole name of the

plaintiff so as to enable the defendant to make false claims for social security benefits. Later, a quarrel ensued and the plaintiff moved out while the defendant remained in occupation. The plaintiff then commenced proceedings against the defendant claiming possession and asserting sole ownership of the property. The defendant delivered a defence and counterclaim claiming an equitable interest in the house on the basis of a resulting trust. The House of Lords by a majority allowed the defendant's counterclaim.

Lord Jauncey of Tullichettle framed the issue at the heart of the case as follows:

> The ultimate question in this appeal is, in my view, whether the respondent in claiming the existence of a resulting trust in her favour is seeking to enforce unperformed provisions of an unlawful transaction or whether she is simply relying on an equitable proprietary interest that she has already acquired under such a transaction.

His Lordship then answered that question:

> I find this a very narrow question but I have come to the conclusion that the transaction whereby the claimed resulting trust in favour of the respondent was created was the agreement between the parties that although funds were to be provided by both of them, nevertheless the title to the house was to be in the sole name of the appellant for the unlawful purpose of defrauding the D.S.S. So long as that agreement remained unperformed neither party could have enforced it against the other. However, as soon as the agreement was implemented by the sale to the appellant alone she became trustee for the respondent who can now rely on the equitable proprietary interest which has thereby been presumed to have been created in her favour and has no need to rely on the illegal transaction which led to its creation.

Lord Lowry said that he was:

> convinced that the right view is that a party cannot rely on his own illegality in order to prove his equitable right, and not that a party cannot recover if his illegality is proved as a defence to his claim.

Lord Browne-Wilkinson who led the majority said:

> In my judgment the time has come to decide clearly that the rule is the same whether a plaintiff founds himself on a legal or equitable title: he is entitled to recover if he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.

So too here. The plaintiff is not seeking to enforce an incomplete executory bargain that is tainted with illegality. Here the land has already been registered in the defendant's name. The alleged illegality relied on by the High Court has nothing whatsoever to do with the resulting trust which the plaintiff seeks to enforce. As Lord Jauncey of Tullichettle in his majority speech in *Tinsley v. Milligan* pointed out, in words wholly apposite to the present case:

> At the outset it seems to me to be important to distinguish between the enforcement of executory provisions arising under an illegal contract or other transaction and the enforcement of rights already acquired under the completed provisions of such a contract or transaction.

It is significant that the pronouncement of the majority in *Tinsley v. Milligan* was applied by the Supreme Court of India in *BOI Finance Ltd v. The Custodian* AIR [1997] SC 1952, where Kirpal J (later Chief Justice) said:

> While there can be no dispute that the transactions in question have to be viewed in the context of the law in this country but the decisions of the Courts in England, based on common law principles, have been applied and followed by the Courts in India. This will be evident from the fact that the decision in the Sajan Singh case, (*Sajan Singh v. Sardara Ali* [1960] AC 167) which was approved by the House of Lords in *Milligan*'s case, has been followed by this Court in *Smt. Surasaibalini Debi v. Phanindra Mohan Majumdar* [1965] 1 SCR 861: (AIR [1965] SC 1364).

The present case is readily distinguishable from the case of *Chettiar v. Chettiar* [1962] MLJ 143. In that case, a father purchased certain property in his son's name to practise deceit upon the public administration. The purchase created the presumption of advancement in the son's favour. Later, the father called on the son to convey the land to him. The son refused. The father brought an action to recover the land. He tried to rebut the presumption of advancement by proving the true purpose for the purchase. It was held that the father failed because he had to rely on the illegal purpose to rebut the presumption of advancement. Lord Denning who delivered the judgment of the Board put the point beyond doubt:

> But in the present case the plaintiff had of necessity to disclose his own illegality to the Court and for this reason: He had not only to get over the fact that the transfer stated that the son paid $7,000 for the land. He had also to get over the presumption of advancement: for whenever a father transfers property to his son, there is a presumption that he intended it as a gift to his son: and if he wishes to rebut that presumption and to say that his son took as trustee for him, he must prove the trust clearly and distinctly, by evidence properly admissible for the purpose, and not leave it to be inferred from slight circumstances, see *Shephard v. Cartwright* [1955] AC 431 at page 445.

In the present case there is no presumption of advancement operating in the defendant's favour. The presumption is quite the other way around. It operates in the plaintiff's favour by way of a resulting trust. There is no presumption for him to rebut.

In our judgment the present case is much closer to *Gorog v. Kiss* [1977] 16 OR (2d) 569. There, the plaintiffs, husband and wife transferred their farm to the defendant, the husband's sister, for the purpose of defeating the plaintiffs' creditors. Later, the plaintiffs called on the defendant to re-convey the farm but she refused. The plaintiffs then brought an action to recover the farm. In their statement of claim they alleged the illegality of the transfer. The High Court of Ontario found for the plaintiffs on the ground that the defendant held the farm lands on a resulting trust for the plaintiffs. An appeal to the Court of Appeal failed and the Supreme Court of Canada refused leave. (See, [1977] 2 SCR ix).

MacKinnon JA when delivering the judgment of the Ontario Court of Appeal said:

> There is no presumption of gift by way of advancement as between brother and sister, as happens in the husband-wife, father and child cases relied on by the appellant. The sister here was certainly not financially dependent on her brother, if anything, it was the other way around. There is, rather, a presumption of a resulting trust to the transferors when, having paid for the property, the purchasers put it in the name of a stranger in law, because equity assumes bargains and not gifts. With respect, in my view, the principles which are applicable here were correctly and concisely stated by Kelly, JA, in *Maysels v. Maysels* [1974] 3 OR (2d) 321, at p. 325:
>
> > It has long been established that, save where the grantee is the wife or child of the grantor, where a spontaneous conveyance is, as between grantor and grantee, voluntary, upon the title to the property becoming vested in the grantee there arises a presumption of a resulting trust thereof of which the grantor is the beneficiary: *Dyer v. Dyer* [1788] 2 Cox 92. In contrast to the foregoing, where the grantee is the wife or child of the grantor no such resulting trust in favour of the grantee arises but there does arise a presumption of advancement and that the wife or child as a donee has the beneficial interest in the property: *Christ's Hospital v. Budgin* [1712] 2 Vern. 683, 23 ER 1043.
>
> It is true that, for reasons best known to the pleader, the plaintiffs pleaded the illegal basis for the transfer which was not necessary to their case. The defendant, however, pleaded, as already stated, that the reason for the transfer was that the defendant would become the legal owner and become responsible for all mortgage payments so that the farm would not be lost either by

foreclosure or to creditors. It was only at the trial, as already pointed out, that the defendant alleged that the transfer was for valuable consideration which evidence was not believed by the trial Judge.

At no time did the defendant allege that the transfer was a gift. Neither did the relationship give rise to a presumption of advancement. **More importantly, the defendant did not allege or admit the illegal purpose. Quite the contrary, although she now wishes to rely on it.** As Sir W. M. James, LJ, said in *Haigh v. Kaye* [1872] LR 7 Ch. 469 at p. 473:

> If a Defendant means to say that he claims to hold property given to him for an immoral purpose, in violation of all honour and honesty, he must say so in plain terms, and must clearly put forward his own scoundrelism if he means to reap the benefit of it. Here he has simply said that the Plaintiff, fearing an adverse decision in the suit of *Haigh v. Haigh*, conveyed the property to him. I think that is not sufficient.

Despite the allegation in the statement of claim, it was not necessary for the plaintiff to rely on the illegality to raise the presumption of a resulting trust once the defence of consideration was rejected. I would adopt here the statement of Idington, J., in *Scheuerman v. Scheuerman* [1916] 52 SCR 625:

> I find cases where the man has, accidentally as it were, or incidentally, to the relation of his story told that which he might if skilfully directed both in pleading and in giving evidence have avoided telling, yet has told enough to disclose that he was far from being always guided by the law or morality in his intentions, and still entitled to succeed because he had in fact established, by the untainted part of his story as it were, enough to entitle him to succeed without reliance upon that which was either illegal or immoral.
>
> In order to attempt to rebut the resulting trust it was the defendant who had to rely on the illegal arrangement, to which arrangement she was an active and willing party. (emphasis added.)

As in *Gorog v. Kiss*, here too the defendant did not at any time allege that the land was a gift to him from the plaintiff. Again, as in *Gorog*, here too the defendant did not allege or admit the illegal purpose. Whereas in *Gorog*, the plaintiffs pleaded the illegal purpose for transferring the farm to the defendant, the plaintiff here volunteered during his evidence in chief the reason for having the land registered in the defendant's name. To this extent, the present case is much stronger for the plaintiff. And if the plaintiffs in *Gorog* succeeded, there is no good reason why the instant plaintiff should not succeed.

We would note in passing that by the common law of Singapore, (in which expression we include the doctrines of Equity) a resulting trust created by an act of parties will not be enforced where to do so will be contrary to public policy. See, *Suntoso Jacob v. Kong Miao Ming* [1986] 2 MLJ 170; *Cheong Yoke Kuen v. Cheong Kok Keong* [1999] 2 SLR 476. However, Malaysian jurisprudence, anchored on the foundation of binding precedent as *Chettiar v. Chettiar* and *Singh v. Ali* [1960] MLJ 52, does not admit of such a principle.

The difference between the position in Singapore and Malaysia demonstrates the flexibility and dynamism of common law jurisprudence. The common law of each jurisdiction develops in the context of its own particular and peculiar circumstances by adapting and modifying principles and doctrines to meet the hopes and aspirations of the members of its society.

The Upshot

For the reasons already given we are of the view that this appeal must succeed. Accordingly the appeal is allowed. The orders of the High Court are set aside. There shall be judgment for the plaintiff as prayed for in his statement of claim. The defendant must duly execute and deliver to the plaintiff's solicitors within 14 days from today, a registrable memorandum of transfer of a half undivided share in the land in question. The stamp duty for the transfer, registration fees and all conveyancing costs shall be borne by the plaintiff. The defendant must pay the plaintiff the costs of this appeal and those incurred in the court below. The deposit shall be paid out to the plaintiff. The parties shall be generally at liberty to apply to the High Court for the carriage of the order of this Court made herein.